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Australian DOCAs versus UK pre-packs and CVAs: sifting through the ashes of comparative dividend returns

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This article is something of a brief extension of recent research into deeds of company arrangement (DOCAs) under Pt 5.3A of the Corporations Act 2001 (Cth), conducted with the support of the Australian Restructuring Insolvency & Turnaround Association's (ARITA's) Terry Taylor Scholarship (TTS). The findings of that research (which comprised a sample review of DOCAs) are available online in a comprehensive report (TTS DOCA Report)[1] and are also summarised in a recent article in ARITA's *Australian Insolvency Journal.*[2] The purpose of this article is to present some of the findings of that research (namely, the dividend outcomes delivered by the sampled Australian DOCAs) in a manner that is consistent with reports which have recently emerged from similar research conducted in the United Kingdom. In so doing, a basic comparison can be made of the performance of Australian DOCAs against analogous UK procedures.

Specifically, the following reports relating to UK pre-packaged administrations were released just after the TTS DOCA Report:

- *Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP* prepared by Teresa Graham CBE (Graham Report);[3] and
- *Pre-Pack Empirical Research: Characteristic and Outcome Analysis of Pre-Pack Administration — Final Report to the Graham Review* prepared by Professor Peter Walton and Chris Umfreville of the University of Wolverhampton (Wolverhampton Report).[4]

Both reports provide detailed findings of distributions to unsecured creditors of companies which were the subject of UK pre-packaged administrations. These UK results are presented a little differently from the TTS DOCA Report, hence the attempt in this article to "harmonise" the presentation of the respective results in each jurisdiction for comparative purposes.

Comparison of "ranges" of dividend returns: Australian DOCAs versus UK pre-packs and trading administrations

Section A2.11 of the Wolverhampton Report stated in relation to UK pre-packs:

> It is observed that in the majority of cases no distribution was made to unsecured creditors in a pre-pack. This does not include a small number of cases where a subsequent liquidation (or in 14 cases the administration itself) are ongoing and there remains a possibility, though not a certainty, of a distribution being made to unsecured creditors.[5]

Section B2.5 of the Wolverhampton Report addressed (as a counterfactual) trading administrations with a sale as a going concern:

> As with the data observed for prepack sales, it appears that in the majority of cases no distribution was made to unsecured creditors in a going concern trading administration sale …
>
> Where a distribution has been made, it tends to be small when compared to the overall unsecured debt figures. There are, however, a small number of more significant distributions to unsecured creditors.[6]

The Wolverhampton Report concluded section B2.5 by stating that the "data available does not show a substantial difference between the levels of distributions to unsecured creditors, as a proportion of overall debts, made in either pre-pack or trading administrations".[7] In relation to pre-packaged administrations, the Graham Report confirmed that "in the majority of cases no distribution was made to unsecured creditors at all" and referred to a chart (figure 7.2 in the Graham Report) which set out the respective percentages of companies (pre-packs) which returned various ranges of dividend returns.[8] The Graham Report also stated that 56% of trading administrations paid no dividend to unsecured creditors.

Australian DOCAs delivering nil returns appear to be nowhere near as prevalent as nil returns generated by UK pre-packs and trading administrations. The TTS DOCA research turned up only 17% of sampled DOCAs which delivered no dividend at all to unsecured creditors. (The various ranges of dividend returns delivered by Australian DOCAs and UK pre-packs are further discussed below.)

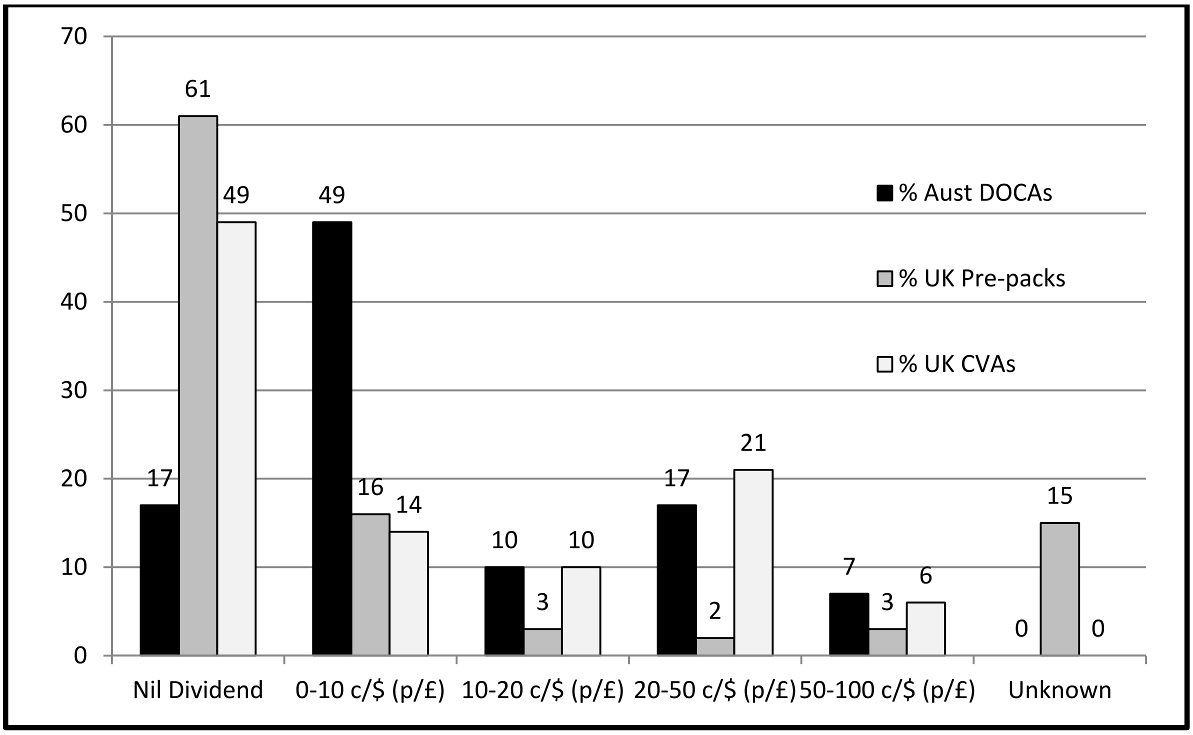
2011 research into the outcomes of UK company voluntary arrangements

It is also worth recounting the findings of research delivered in 2011 by Professor Adrian Walters and Dr Sandra Frisby (Walters/Frisby Report),[9] which analysed a sample of UK company voluntary arrangements (CVAs) entered into in 2006 under the Insolvency Act 1986 (UK). (A CVA might be described as the UK equivalent to an Australian DOCA.) The sample review found that 49% of CVAs returned a nil dividend to unsecured creditors, a similarly underwhelming performance in comparison with Australian DOCAs.[10]

Insofar as UK CVAs are thrown into the comparative mix, it should be noted that the Walters/Frisby Report stated that only 6% of the CVAs sampled were utilised through an administration procedure. Most CVAs (86%) were implemented on a "stand-alone" basis without the appointment of an external administrator or the benefit of a statutory moratorium.[11]

To present a succinct comparison of UK pre-pack and CVA returns against those achieved by Australian DOCAs, figure 1 sets out the dividend outcomes of 71 sampled Australian DOCAs against the findings of the Graham and Walters/Frisby Reports:[12]

Figure 1: Comparative dividend outcomes of Australian DOCAs, UK pre-packs and UK CVAs (unsecured creditors)



It can be observed that the collective outcomes delivered by UK pre-packs appear to be well inferior to those of Australian DOCAs. As regards the returns from Australian DOCAs in comparison with UK CVAs, the percentage of Australian DOCAs returning a dividend in the range of 10 cents or more in the dollar (34%) is commensurate with the percentage of UK CVAs achieving the same rate of return (37%). However, Australian DOCAs appear to have a markedly better "strike rate" of achieving a return of less than 10 cents in the dollar (the sort of return which might be characterised as "something is better than nothing"). In short, Australian DOCAs appear to deliver a higher prevalence of modest returns in comparison with UK pre-packs and CVAs, which deliver nothing to unsecured creditors in around half or more of all cases.

Comparison of median dividend returns in Australian DOCAs, UK pre-packs and UK trading administrations

Due to the high prevalence of nil dividend returns, the median dividend return across all UK pre-packaged administrations sampled for the Graham Review was also nil (zero). This compares with a median dividend return of 5.4 cents in the dollar for the Australian DOCAs sampled and reviewed for the TTS project. The Graham Report also provides the median dividend return for those pre-packs *where a distribution was made* (ie, 4.3 pence in the pound).

Table 1 sets out the various median dividend returns for comparative purposes.

Table 1: Comparative median dividend returns to unsecured creditors (Australian DOCAs, UK pre-packs and UK trading administrations) (UK returns sourced from the Graham Report)

Australian DOCAs **(71 DOCAs)**	**UK pre-packs**	**UK trading administrations**
5.4 c/$	Nil	Nil
Australian DOCAs which paid a dividend **(59 DOCAs)**	**UK pre-packs which paid a dividend**	**UK trading administrations which paid a dividend**
7.87 c/$	4.3 p/£	7 p/£

When assessing the collective performance of an insolvency procedure, one might ask what (if any) regard should be paid to the UK median distributions in the *minority* of cases where a dividend was paid. Nevertheless, such findings were provided in the Graham Report and the equivalent finding for Australian DOCAs is provided in table 1 for comparative purposes.

Observations and caveats

In seeking to draw Anglo-Australian comparisons, Australian DOCAs, UK administrations and UK CVAs can never purely be compared on a "like-with-like" basis due to inevitable differences in the features and nuances of the regimes and legal frameworks operating in each jurisdiction. For example, the author understands that significant or "substantial" secured creditors (charge-holders) are more prevalent stakeholders in UK pre-packaged administrations, due to the inability of a UK secured creditor to appoint an "administrative receiver" (the UK equivalent to Australia's "receiver and manager"). In Australia, secured creditors invariably "stand outside" a DOCA (indeed, in the cases of Australian small to medium enterprises, it appears that often there is no substantial charge-holder involved at all).

In this regard, the UK experience stands as something of a curious, bipolar approach to policy and lawmaking. The promotion of collective insolvency procedures was the ostensible rationale for abolishing administrative receivership through the passing of the Enterprise Act 2002 (UK). However, at the very same time, the legislature allowed the "pre-pack genie" to well and truly escape the bottle, rather than rein in the practice by regulation. The result is that a UK bank often exercises effective control of a pre-packaged administration which — by its very nature — is the antithesis of a collective process or "creditor democracy".

Focusing solely on the dividend outcomes of Australian DOCAs, figure 1 might be said to put a more positive complexion on the performance of Pt 5.3A DOCAs than the "low" weighted average and median dividend findings stated in the TTS DOCA Report.[13] The TTS DOCA Report disclosed a weighted average dividend of 5.86 to 7.55 cents in the dollar (depending on the exclusion of outliers) and a median dividend of 5.4 cents in the dollar. Modest numbers to be sure, but figure 1 also demonstrates that:

- around one-third of all DOCAs (ie, 34%) achieve a return to unsecured creditors of 10 cents or more in the dollar; and
- around one-quarter of all DOCAs (ie, 24%) achieve a return to unsecured creditors of 20 cents or more in the dollar.

Conclusion

Notwithstanding the imperfections of jurisdictional comparisons, there are grounds for contending that Australian DOCAs perform relatively well for unsecured creditors in comparison with the UK pre-pack administration and CVA procedures. In the context of the ongoing debate regarding pre-packs, one might also argue that there is some evidence that more (not less) unsecured creditor participation results in enhanced returns to unsecured creditors. That said, the "success" or otherwise of an insolvency procedure or regime is in the eye of the beholder. Reasonable minds may differ on how the same statistics or findings ought to be interpreted or "judged". Findings which present as a success to one observer may well constitute a failure to another.

It is hoped that this addendum to the TTS DOCA Report assists ongoing analysis and debate of the outcomes of Australia's Pt 5.3A voluntary administration regime against the backdrop of developments and trends in other jurisdictions (whether in the United Kingdom or elsewhere).

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[1] M Wellard *A Sample Review of Deeds of Company Arrangement under Part 5.3A of the Corporations Act: 2013 ARITA Terry Taylor Scholarship Report* 19 May 2014, available at www.arita.com.au.

[2] M Wellard "A review of deeds of company arrangement" (2014) 26(2) *Australian Insolvency Journal* 12.

[3] T Graham CBE *Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP* June 2014, available at www.gov.uk.

[4] P Walton and C Umfreville *Pre-Pack Empirical Research: Characteristic and Outcome Analysis of Pre-Pack Administration — Final Report to the Graham Review* April 2014, available at www.idmarch.org.

[5] Above, n 4, p 31. Of 471 companies, more than 58% (275/471) "resulted in no dividend for unsecured creditors".

[6] Above, n 4, p 64. Of 95 companies, over 50% (49/95) "resulted in no dividend to unsecured creditors".

[7] Above, n 4, p 66.

[8] Above, n 3, pp 31–33 [7.32]–[7.36].

[9] A Walters and S Frisby *Preliminary Report to the Insolvency Service into Outcomes in Company Voluntary Arrangements* 23 March 2011, available at http://ssrn.com/abstract=1792402.

[10] Above, n 9, p 25.

[11] Above, n 9, pp 10–11.

[12] As explained in the TTS DOCA Report, 72 DOCAs were sampled but dividend outcomes were only able to be ascertained from final Forms 524 for 71 DOCAs.

[13] Above, n 1, p 15.